



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

ELP

Docket No. 5435-99

7 February 2000

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

Ref: (a) 10 U.S.C.1552

Encl: (1) DD Form 149 w/attachments
(2) Case Summary
(3) Subject's Naval Record

1. Pursuant to the provisions of reference (a), Petitioner, an enlisted member of the United States Marine Corps, applied to this Board requesting, in effect, that her naval record be corrected by removing the nonjudicial punishment (NJP) imposed on 13 January 1988, a reduction order of 14 January 1988, the administrative remarks (page 11) entry of 28 July 1988, and proficiency and conduct marks of 22 March and 16 August 1988.

2. The Board, consisting of Messrs. Pfeiffer and Whitener, and Ms. Schnittman reviewed Petitioner's allegations of error and injustice on 2 February 2000, and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Although it appears that Petitioner's application to the Board was not filed in a timely manner, it is in the interest of justice to waive the statute of limitations and review the application on its merits.

c. Petitioner enlisted in the Marine Corps on 3 August 1987 for five years as a PFC (E-2). The record reflects that she served without incident until 13 January 1988 when she received nonjudicial punishment (NJP) for being in an unauthorized area, specifically, a male Marine's room. Punishment consisted of reduction in rank to PVT (E-1), forfeitures of \$335 per month for two months, and 30 days of restriction. The following day, a reduction order was issued showing that she was reduced to PVT. However, on 21 January 1988 the reduction in rank was suspended. On 22 March 1988 she was assigned marks of 4.3 in proficiency and 3.0 in conduct.

d. The record further reflects that Petitioner was formally counseled on 28 July 1988 for being in a male Marine's room. However, on 1 August 1988 she was advanced to LCPL (E-3). On 16 August 1988 she was assigned marks of 4.4 in proficiency and 3.5 in conduct. Thereafter, she served without further incident and was advanced to CPL (E-4).

e. Petitioner has since reenlisted twice with no breaks in service. She was awarded the Navy Achievement Medal on 30 September 1994 and has been promoted to SSGT (E-6). Her last reenlistment was on 4 May 1996 for four years.

f. At enclosure (2), an advisory opinion from the Military Law Branch (JAM 2), Headquarters, Marine Corps, recommends denial of Petitioner's requests for removal of the NJP entry of 22 January 1988, the administrative counseling entry of 28 July 1988, and the proficiency and conduct marks of 22 March and 16 August 1988. In this regard, JAM notes Petitioner's complaint that the NJP entry is incorrect because it states that she did not appeal the NJP, despite the fact that she wished to appeal the punishment. However, the opinion notes that she also indicates that the NJP authority suspended the reduction when she submitted an appeal, and does not complain that she was denied her right to appeal. Accordingly, it appears that she was satisfied with the NJP authority's action, elected not to further pursue her appeal, and was not denied any substantive right. Therefore, the NJP entry should remain. JAM further notes that the adverse administrative counseling was correct on its face and is entitled to a presumption of regularity--whether related to the NJP offense or to a similar but subsequent offense. Petitioner did not exercise her right to file a rebuttal statement at the time, and now offers no proof of any irregularity. Therefore, the entry should remain in the record. With regard to the marks assigned, JAM states that the 3.0

conduct mark of 22 March 1988 could properly take into account the misconduct for which she received NJP. JAM also was not convinced that the 3.5 conduct mark of 16 August 1988 was related to the same misconduct for which Petitioner received NJP. Although the mark was preceded by an adverse counseling entry, Petitioner offered no convincing proof that the counseling concerned the same incident for which she received NJP. JAM notes the absence of a counseling entry explaining the low mark as required by regulation, but states that the issue involving removal of the mark is beyond JAM's purview. JAM does recommend removal of the reduction order since it is clear that the reduction in rank was suspended and never executed.

G. Also at enclosure (2), an advisory opinion from the Manpower Management Information (MI) Division, HQMC, states that a conduct mark below 4.0 must be supported by a documented page 11 counseling entry, a court-martial (page 13 entry), or NJP (page 12) entry during the reporting period. The conduct mark of 3.0 assigned on 22 March 1988 was supported by the NJP of 13 January 1988. The conduct mark of 3.5 assigned on 16 August 1988 was supported by a page 11 counseling entry dated 28 July 1988. However, the advisory opinion notes Petitioner's claim that the contested counseling entry was the result of a requirement to "finalize the NJP" and was not the result of further misconduct. The advisory opinion asserts that there is no provision in the regulation for a commander to authorize such an entry. The advisory opinion points out that if Petitioner had not overcome her deficiency during the six month suspension period from the NJP, the appropriate action would have been to vacate her reduction in grade, which would have resulted in an additional page 12 entry. However, no such action occurred since she was promoted to LCPL on 1 August 1988. Accordingly, the advisory opinion concludes that the page 11 counseling entry of 28 July 1988 did not meet the elements of a proper page 11 entry. Based on the foregoing, the opinion recommends removal of the proficiency and conduct marks of 16 August 1988, the page 11 entry of 28 July 1988, and the reduction order of 14 January 1988. The marks should be replaced with the initials "NA." However, the opinion also recommends that the 22 January 1988 NJP entry and the proficiency and conduct marks of 22 March 1988 remain in the record.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants partial

favorable action. In this regard, the Board notes that except for this single NJP, Petitioner has an otherwise excellent record and has been promoted to SSGT. The Board notes the JAM advisory opinion in this case but does not fully concur with its recommendation, but instead fully concurs with the comments and recommendation contained in the MI Division advisory opinion. Accordingly, the Board concludes that it would be appropriate and just to correct Petitioner's record by removing the proficiency and conduct marks of 16 August 1988, the reduction order of 14 January 1988, and the page 11 entry of 28 July 1988.

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing the reduction order of 14 January 1988 and the page 11 counseling entry of 28 July 1988.

b. That the record be further corrected by removing the proficiency and conduct marks of 16 August 1988 and replacing them with "NA."

c. That no further relief be granted.

d. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

e. That any material directed to be removed from Petitioner's naval record be returned to the Board together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross references being made a part of Petitioner's naval record.

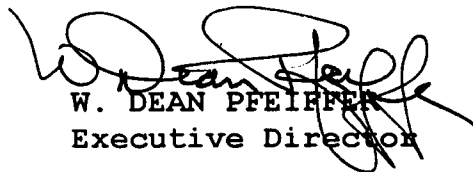
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder


ALAN E. GOLDSMITH
Acting Recorder

5. Pursuant to the delegation of authority set out in Section 6 (e) of the revised Procedures of the Board for Correction of

Naval Records (32 Code of Federal Regulations, Section 723.6 (e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.


W. DEAN PFEIFFER
Executive Director